

² The record provided to the Board includes evidence received after OWCP issued its February 15, 2017 decision. The Board's review is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 12, 2016 appellant, then a 52-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that while in the performance of duty on July 16, 2013 he twisted his right knee as he descended steps from the back of a bus and stepped down to the ground. His knee was painful for approximately one minute, but he was then able to walk the pain off. However, when appellant awoke on July 17, 2013, he could not stand on his right leg and experienced sharp pain in his right knee, without swelling. He did not stop work. No evidence was received with the claim.

By development letter dated June 21, 2016, OWCP advised appellant of the factual and medical evidence needed to establish the claim. It requested that he respond to the questions on an attached development questionnaire and submit medical evidence from a physician which contained an opinion supported by a medical rationale as to how the reported work incident caused or aggravated a diagnosed medical condition. Appellant was afforded 30 days to submit the additional information.

In a July 12, 2016 e-mail, appellant indicated that, at the time of his incident, staff had been instructed that, if there was no need to take time off from work, they were to report the incident to the safety officer and write a memorandum to record the injury for later reference. In a July 17, 2013 e-mail sent to the employing establishment's safety officer, he wrote that he was riding shotgun in the rear of the bus on July 16, 2013. When the bus returned to the employing establishment at approximately 2:30 p.m., appellant exited the bus by climbing down the step ladder. As he stepped onto the ground, he somehow twisted his right knee. Appellant's knee was painful for a second and then he walked the pain off. On July 17, 2013 he awoke and could not stand on his right leg for a minute or two. Appellant had very sharp pains and weakness in his right knee, but no swelling. Once his knee warmed-up, he was able to move freely with a little pain, but he could not twist or turn too fast.

A July 18, 2013 x-ray of appellant's right knee was interpreted by Dr. Derek Keith Kelly, Board certified in emergency medicine, as revealing mild degenerative changes and old postsurgical changes in the proximal tibia.

By decision dated July 26, 2016, OWCP denied the claim. It found that appellant had established that he was a federal civilian employee who filed a timely claim and that the injury and/or event(s) occurred as described. However, appellant had not established the medical component of the third basic element, fact of injury. OWCP noted that he had not submitted any evidence which contained a medical diagnosis in connection with the accepted July 16, 2013 employment incident.

On August 16, 2016 OWCP received appellant's August 10, 2016 request for a review of the written record before a representative of OWCP's Branch of Hearings and Review.

Several photographs of a bus and a person descending from a stepladder on the back of the bus were submitted.

By letter dated September 8, 2016, OWCP requested additional information from the employing establishment regarding whether appellant was in the performance of duty and on the employing establishment's premises at the time of the claimed injury. The employing establishment did not respond.

By decision dated October 27, 2016, an OWCP hearing representative affirmed OWCP's July 26, 2016 decision. She found that the medical component of fact of injury had not been established.

In a November 22, 2016 letter, appellant requested reconsideration. He indicated that there was a lot of confusion and miscommunication about OWCP's request for additional information from the employing establishment. Copies of e-mails which described the confusion/miscommunication were included.

An October 25, 2016 memorandum to the Safety Department from Lieutenant J.P. indicated that, on July 16, 2013, appellant was assigned to the employing establishment's transportation bus, which transported prisoners from Oklahoma City to Carswell.

No additional medical information was received.

By decision dated February 15, 2017, OWCP denied reconsideration, finding that the evidence submitted was irrelevant or immaterial to the medical issue.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence⁴ including that he or she sustained an injury in the performance of duty and that any specific condition or disability from work for which he or she claims compensation is causally related to that employment injury.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.⁶ There are two components involved in establishing fact of injury. First, the employee must submit

³ *Supra* note 1

⁴ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁵ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.⁷

The second component is whether the employment incident caused a personal injury, which generally can be established only by medical evidence.⁸ The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing causal relationship between the claimed condition and the identified factors.⁹ The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a right knee condition causally related to the accepted July 16, 2013 employment incident.

The only medical evidence appellant submitted was a July 18, 2013 x-ray of the right knee, interpreted by Dr. Kelly which revealed mild degenerative changes and old postsurgical changes in the proximal tibia. Medical evidence of diagnostic testing is of limited probative value as it fails to provide a physician's opinion on causal relationship between appellant's work incident and the diagnosed conditions.¹¹ Dr. Kelly did not offer an opinion on whether the degenerative changes and old postsurgical changes in the proximal tibia were caused or aggravated by the accepted July 16, 2013 employment incident.¹² This x-ray report is, therefore, of limited probative value.

Further, appellant's narrative describing the pain he experienced in his right knee is insufficient to establish that he sustained an injury as he is a lay person and not a physician. The Board has held that lay persons are not competent to render medical opinions.¹³

⁷ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁸ *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

⁹ *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

¹⁰ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

¹¹ See *M.S.*, Docket No. 17-1044 (issued February 2, 2018).

¹² *A.D.*, 58 ECAB 159 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹³ See *James A. Long*, 40 ECAB 538 (1989); see also *J.D.*, Docket No. 15-1879 (issued February 10, 2016).

As there is no medical evidence explaining how climbing down a stepladder on the back of a bus and stepping onto the ground caused or aggravated appellant's right knee condition, appellant has not met his burden of proof to establish his claim.¹⁴

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹⁵ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹⁶

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁷ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.¹⁸ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁹

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record,²⁰ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²¹

¹⁴ See *J.K.*, Docket No. 16-1850 (issued January 9, 2017); see also *K.G.*, Docket No. 15-1139 (issued September 28, 2016).

¹⁵ 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

¹⁶ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

¹⁷ 20 C.F.R. § 10.606(b)(3). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹⁸ *Id.* at § 10.607(a).

¹⁹ *Id.* at § 10.608(b).

²⁰ See *A.L.*, *supra* note 16. See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

²¹ *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

In support of his November 22, 2016 reconsideration request, appellant submitted a November 11, 2016 letter, in which he noted confusion and miscommunication concerning OWCP's request for additional information from the employing establishment regarding the accepted employment incident. He merely noted initial miscommunication regarding submission of evidence that pertained to the factual portion of his claim. However OWCP has accepted that the employment incident occurred as alleged. The issue underlying the denial of appellant's claim is medical in nature - that is whether he has established a right knee condition was causally related to the accepted employment incident. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, he did not advance a relevant legal argument not previously considered. Consequently, appellant was not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b).⁸

Appellant also submitted an October 25, 2016 memorandum from Lieutenant J.P., which noted appellant's assignment on the date of injury. The Board finds that submission of this evidence does not require reopening appellant's case for merit review as it failed to address the underlying medical issue before OWCP.²² The evidence appellant submitted was not relevant to the issue of causal relationship because it was not medical evidence, but was rather factual information.²³ The evidence, therefore, is insufficient to require merit review of the claim. The Board thus finds that this evidence does not constitute relevant and pertinent new evidence. Therefore, this evidence is insufficient to require OWCP to reopen appellant's claim for consideration of the merits.²⁴

Appellant failed to show that OWCP erroneously applied or interpreted a specific point of law, or advanced a relevant legal argument not previously considered by OWCP. Because he did not submit relevant and pertinent new evidence with his request for reconsideration, the Board finds that he did not meet any of the necessary requirements and is not entitled to further merit review.²⁵

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a right knee condition causally related to the accepted July 16, 2013 employment incident. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²² *Id.* See also *G.W.*, Docket No. 16-0517 (issued April 27, 2016).

²³ See *D.A.*, Docket No. 17-0535 (issued June 27, 2017).

²⁴ *Id.*

²⁵ See *L.H.*, 59 ECAB 253 (2007).

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2017 and October 27, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 21, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board